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In The

Supreme Court of the United States

October Term, 1990

PAUL McNEIL,

Petitioner,

vs.

THE STATE OF WISCONSIN,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Wisconsin

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The People of the State of Illinois as amicus curiae have a compelling interest in the outcome of this case because the rule sought by Petitioner, while providing no needed benefit to criminal defendants, would jeopardize non-coercive police practices as well as prosecutions and convictions in numerous serious cases in this State.

ARGUMENT

I.

A RULING ADVERSE TO THE STATE WOULD JEOPARDIZE MANY INVESTIGATIONS, PROSECUTIONS, AND CONVICTIONS FOR SERIOUS CRIMES.

This Court is being asked in this case to require a *per se* protective rule which criminal defendants already have at their disposal simply by invoking their rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966); this heightened protection would assist only those defendants who have never expressed a desire for it – and might even cover cases of those who have expressly waived it by confessing to the charge which brought them into custody – since those who have asked for counsel during interrogation on any charge are already protected under *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093 (1988); and this unnecessary protection would come at great expense to the states. This is a critical case: its resolution will affect a large number of Illinois cases involving particularly heinous crimes.

For at least seven years police and prosecutors in Illinois have obtained and utilized confessions like

McNeil's pursuant to the Illinois Supreme Court's holding that an incarcerated individual's acceptance of counsel at a preliminary hearing on one charge does not implicate the Fifth Amendment for purposes of a separate investigation. *See People v. Martin*, 102 Ill. 2d 412, 466 N.E.2d 228, 229, 233, *U.S. cert. denied*, 469 U.S. 935 (1984) (reaffirmed in dicta in *People v. Kidd*, 129 Ill. 2d 432, 544 N.E.2d 704, 713 (1989)). Thus, within the last several months alone, the issue of admission of confessions to unrelated crimes after appointment of counsel on initial charges has arisen in at least seven cases decided by or pending in the Illinois appellate courts[1]. Two of these cases are capital, one involving the murder of ten children. All the convictions are for murder or manslaughter. Adoption of the rule advocated by Petitioner would jeopardize these convictions as well as untold numbers of prosecutions and pending and future investigations.

The significant number of cases in which police obtain a confession to an unrelated crime after a defendant appears with counsel for a court appearance reflects two practical realities: the natural course of legitimate non-coercive police investigation and the nearly universal invocation of the Sixth Amendment right to counsel by individuals charged with a crime. With regard to

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[1] *People v. Bryant*, ___ Ill. App.3d ___, 559 N.E.2d 930, 934-8 (1st Dist. 1990); *People v. Jackson*, 198 Ill. App.3d 831, 556 N.E.2d 619, 624-8 (1st Dist. 1990); *People v. Maxwell*, No. 67022 (pending before Illinois Supreme Court); *People v. Maust*, No. 88-2109 (pending before Appellate Court of Illinois); *People v. Coleman*, No. 86-409 (pending before Appellate Court of Illinois); *People v. Hunt*, No. 89-1670 (pending before Appellate Court of Illinois).

police investigations, once a person is brought into custody, proper police work requires that the police focus their attention on that individual, gather and examine identifying evidence such as fingerprints, consult acquaintances, and often consequently find a missing link, see a serial pattern, or discover a separate crime from that which brought the individual to their attention. Since the police can retain suspects only briefly absent pending charges,[2] they are likely to charge the first crime for which they have proof despite the potential for discovery of other, perhaps more serious offenses which may take longer to unearth or investigate.

Indeed, in many cases, the later-discovered crimes are as serious as or more serious than the one for which the individual is initially charged. For instance, in the capital case of *People v. Maxwell*,[3] police arrested the defendant upon his commission of several armed robberies from which he netted a car and $110; more than a week later the police discovered that defendant had shot and killed a robbery victim the previous month. In *People v. Jackson*, 556 N.E.2d at 621, two days after the defendant's arraignment for home invasion and rape, acquaintances gave the police evidence that the defendant had also murdered two women.

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[2] For example, the Chicago Police Department's general orders require that an arrestee be taken to court within 24 hours of arrest. Teletype Order 415, January 14, 1986. This order was implemented to comply with this Court's opinion in *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1973).

[3] No. 67022 (pending before the Illinois Supreme Court), Trial Record at 53, 157-9, 171-5, 178-9, 1041-44, 1065-76.

Coupled with the potential discovery of multiple crimes and the need to press charges quickly is the fact that, upon being charged with any one crime, defendants obtain counsel as a matter of course. Courts scrupulously dissuade individuals from facing prosecution without counsel, and by statute, Illinois judges routinely, and often *sua sponte*, appoint counsel upon an indigent individual's first court appearance following arrest. *See* Ill. Rev. Stat. ch. 38, secs. 109-1(b)(2), 113-3. For instance, in *People v. Maxwell*, the defendant and his co-defendants spoke just one word each prior to the court's appointment of counsel on its own initiative at their preliminary appearance:

> THE COURT: Each of you are charged with robbery. Armed robbery and attempt armed robbery. Do any of you have your own lawyers or any money to hire a lawyer?
>
> [DEFENDANT HOWARD]: No.
>
> [DEFENDANT MAXWELL]: No.
>
> [DEFENDANT THOMPSON]: No.
>
> THE COURT: A Public Defender is appointed for each of you three defendants.[4]

Hence, practically speaking, in every case in which police discover an individual's involvement in other crimes after filing one charge, the individual has already obtained counsel. As a result, the rule sought by Petitioner would require finding a Fifth Amendment invocation in every such case. As will be shown, however, the fact that an individual has counsel should be presumed to

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[4] No. 67022 (pending before Illinois Supreme Court), Trial Record at 94.

result from the State's formal accusation initiating prosecution and not to reflect the suspect's preference as to how to handle police interrogation on unrelated, uncharged offenses.

II.

ACQUISITION OF COUNSEL ON UNRELATED CHARGES DOES NOT IMPLICATE THE *EDWARDS* CONCERN.

The rationale of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), and *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981), is that protection of the Fifth Amendment right against self-incrimination from the "inherently compelling pressures" of custodial interrogation requires a presumption that once a suspect has indicated inability to deal *with those pressures* absent counsel, any subsequent uncounseled confession initiated by the police is a product of explicit or subtle compulsion. *See Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 2097-8 (1988); *Smith v. Illinois*, 469 U.S. 91, 105 S.Ct. 490, 494 (1984). This rationale has no bearing on multiple crime investigations in which the invocation of the right to counsel does not occur in the context of custodial interrogation but rather reflects the need for an accused to be represented by a lawyer during the course of a formally initiated prosecution.

As in the *Maxwell* hearing quoted above, Illinois courts typically appoint or ensure retention of counsel for charged individuals *pro forma* at preliminary hearings. In so doing, the courts make no explicit or implied determination that the defendant is incapable or feels incapable of handling custodial interrogation without an

attorney. The obtaining of counsel occurs *without regard* to whether the accused is continuously incarcerated, to be released, or at liberty. Since counsel are retained or appointed equally for individuals at liberty and for those in jail, and equally for those prisoners interrogated by police and those who are not, it defies logic to interpret the receipt of counsel as an invocation of *Miranda*, which "extraordinary safeguard 'does not apply outside the context of the inherently coercive custodial interrogation for which it was designed.' " *Minnesota v. Murphy*, 465 U.S. 420, 430, 104 S.Ct. 1136, 1144 (1984) (citation omitted).

The judicial practice of ensuring representation on pending charges reflects the *Sixth* Amendment concern that once charged with a crime, "the average defendant does not have the professional legal skill to protect himself[.]" *Johnson v. Zerbst*, 304 U.S. 458, 462-3, 58 S.Ct. 1019 (1938). Such judicial intercession stands in contrast to the complete lack of involvement by courts during custodial interrogation when individuals routinely choose and are deemed capable of choosing to talk to the police without counsel. Where the court appoints counsel, the implicit purpose and hence scope of appointment is for representation on a particular charge, not for a blanket provision of services on any legal matter that might arise – divorce, will-drafting, or representation on an unrelated uncharged crime.

From the defendant's perspective as well as the court's, self-incrimination with respect to a separate crime cannot logically be deemed the motivating concern behind obtaining counsel on a charged crime. The category of defendants at issue in this case consists solely of those who have *not* expressed the need for counsel to

deal with custodial interrogation; those who have are protected under *Roberson*. Hence, the relevant defendants either have waived *Miranda* and confessed to the initial charge, invoked the right to remain silent but not requested an attorney, or have not as yet been questioned by the police.

As these defendants stand in court, they are surely not focusing on the possibility of subsequent interrogation by the police about an unrelated charge. The typical fact pattern in these cases is that the defendants never – in court, before, during or after interrogation – express concern that they cannot handle the pressure of custodial interrogation without legal assistance. Upon receiving *Miranda* warnings from the police prior to interrogation on the separate offense after their court appearance on the initial charge, these defendants do not mention to the police that they have an attorney, request an attorney, or ask to call an attorney, and when permitted to use the phone, do not call an attorney.[5] These facts demonstrate not that the defendant's will has somehow been overborne by the mere administration of *Miranda* warnings after a court appearance with a lawyer on a separate charge, but rather that even suspects who have a particular attorney whom they have seen act on their behalf in court will often choose with a free will to deal with the police when a separate crime comes to light.

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[5] *E.g.*, *People v. Maxwell*, No. 67022 (pending before Illinois Supreme Court), Trial Record at 276-7, 340, 394, 400, 450, 460, 464; *People v. Kidd*, No. 66609 (pending before Illinois Supreme Court), Trial Record at 66, 70, 77, 94, 101, 122-3, 127, 136-7, 139, 143-4, 146, 148, 150, 151.

In some cases, indeed, the defendant clearly demonstrates a distinct attitude toward involvement of counsel for Fifth and Sixth Amendment purposes by willingly talking to the police without counsel about the initial crime and then accepting counsel once charged. In *People v. Kidd*, No. 66609 (pending before the Illinois Supreme Court), for instance, the defendant confessed to several murders, was charged therefor, retained counsel on those charges, and then waived his *Miranda* rights again before confessing to killing ten other children.[6] Clearly in such cases the defendant's acquisition of counsel does not result from a perceived inability to deal with police questioning. To so interpret the retention of counsel would deprive the defendant of the right to decide whether to cooperate with the police.

Significant distinctions exist from a defendant's self-interested perspective between questioning about a pending charge and questioning about an unrelated investigation. Before indictment, a suspect might want to talk to the authorities, perhaps to clear himself of the charge or reduce his exposure by revealing more culpable offenders. The incentives to talk to the police diminish

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[6] *See People v. Kidd* ("Kidd I"), 129 Ill.2d 432, 544 N.E.2d 704, 704-5 (1989). The same pattern of a *Miranda* waiver on the initial charge, acquisition of counsel upon arraignment, and subsequent *Miranda* waiver on an unrelated charge, occurred in *People v. Jackson*, 198 Ill. App.3d 831, 556 N.E.2d 619, 621-2 (1st Dist. 1990). Although such cases might not be governed by a ruling against Wisconsin in this case, they demonstrate the senselessness of interpreting the acquisition of counsel as a Fifth Amendment invocation.

post-indictment, when the government is committed to prosecute:

> [T]he return of an indictment . . . presumably signals the government's conclusion that it has sufficient evidence to establish a prima facie case. As a result, any further interrogation can only be designed to buttress the government's case; authorities are no longer simply attempting "to solve a crime."

Patterson v. Illinois, 487 U.S. 285, 101 L.Ed.2d 261, 108 S.Ct. 2389, 2402 (1987) (Stevens, J., dissenting) (citations omitted).

In addition, a suspect in custody pursuant to a single investigation is aware of the investigation and its nature and can initiate renewed communications if he wishes. Extending the *Edwards* rule to an unrelated investigation would in practical terms deprive the suspect of knowledge of the very existence of the new investigation, since police know that in reality contact through defense counsel is likely to be futile. The prospect that an informed, unrepresented defendant would choose to cooperate justifies a simple inquiry to ascertain his wishes.

Such an inquiry carries no coercive force. Where the defendant has not expressed the need for counsel during custodial interrogation, the *Edwards* protection is unnecessary because the balance of power between suspects and police is the same as where only one charge is involved. The police still have only one opportunity to interrogate the incarcerated suspect unless the suspect proves willing to submit to more, and must precede questioning with *Miranda* warnings. The suspect need only inform his interrogators that he wishes the assistance of counsel to prohibit further contacts.

In summary, the rule proposed by Petitioner in this case requires a judicial fiction as to the meaning of acquiring counsel on a pending charge, a fiction without support in the rationale of the *Edwards* rule. Where the purpose of obtaining counsel is to protect a defendant's Sixth Amendment interests on pending charges, without relation to the fact that the defendant is incarcerated and unmotivated by police interrogation, "[t]o conclude that [a defendant] invoked his right to counsel for all purposes requires not a broad interpretation of an ambiguous statement, but a disregard of the ordinary meaning of [the defendant's] statement." *Connecticut v. Barrett*, 479 U.S. 523, 107 S.Ct. 828, 832 (1987). Such disregard would disserve not only the State's interest in using properly obtained evidence, but the interest of suspects in controlling the exercise of their rights:

> Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny – not barring an accused from making an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone. If an accused "knowingly and intelligently" pursues the latter course, we see no reason why the uncounseled statements he then makes must be excluded at his trial.

Patterson v. Illinois, 108 S.Ct. at 2394.

While in hindsight defendants may not be pleased with the outcome of their election to "go it alone" during custodial interrogation, this Court should interpret the acquisition of counsel on an initial charge for what it clearly is at the time – an invocation of the Sixth Amendment right to counsel on a pending charge – and nothing more. Defendants have ample opportunity to choose

freely whether to invoke the Fifth Amendment *Miranda* right upon receiving the *Miranda* warnings prior to questioning by the police about separate charges.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that this Court affirm the decision of the Supreme Court of Wisconsin.

Respectfully submitted,

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